87-1224

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

APPEAL FROM A JUDGMENT OF THE CALIFORNIA SUPREME COURT IMPOSING DISCIPLINE UPON AN ATTORNEY AS RECOMMENDED BY THE REVIEW DEPARTMENT OF THE STATE BAR OF CALIFORNIA

JURISDICTIONAL STATEMENT

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45PP

QUESTION PRESENTED

1. Whether, for purposes of lawyer discipline, Rule 2-101 of the Rules of Professional Conduct of the State Bar of California and the Standard promulgated by the Board of Governors of the State Bar pursuant to such rule, which create a presumption that "testimonial" advertising by attorneys is false, misleading or deceptive, violate the Free Speech Clause of the First Amendment of the Constitution of the United States because:

a. they impermissibly shift the burden of proof to the accused attorney to show that the "testimonial" advertising is not false, misleading or deceptive; and

b. as applied, they constitute a "blanket ban" on "testimonial" advertising?

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No. _____

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MARK H. ORING,

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THE STATE BAR OF CALIFORNIA,

Appellee.

APPEAL FROM A JUDGMENT OF THE CALIFORNIA SUPREME COURT IMPOSING DISCIPLINE UPON AN ATTORNEY AS RECOMMENDED BY THE REVIEW DEPARTMENT OF THE STATE BAR OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

On June 2, 1987, the Review Department of the State Bar of California convened "In the Matter of Mark H. Oring," and resolved as follows:

> "*RESOLVED* that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring, would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted."

Four referees voted "NO" on the adoption of such resolution, based upon their belief that the presumption and or Rule 2-101(D) was unconstitutional. A copy of the Minutes of the Review Department are printed in Appendix "A."

This resolution overruled the December 5, 1984, decision of the Hearing Panel of the State Bar Court of California, which unanimously agreed that Appellant was not culpable because Rule 2-101 was unconstitutional. A copy of the panel's findings of fact and recommendation is printed in Appendix "B."

Appellant petitioned the California Supreme Court for a writ of review. On October 28, 1987, the California Supreme Court denied the petition. A copy of the order denying the petition is printed in Appendix "C."

JURISDICTION

This is a disciplinary action brought by the State Bar of California against the Appellant. On June 2,

1987, the Review Department of the State Bar of California resolved that Appellant be publicly reproved. The Supreme Court of the State of California entered its order denying Appellant's petition for writ of review on October 28, 1987, and thus upheld the constitutionality of the California State Bar's Rule of Professional Conduct, 2-101 and the Standard promulgated thereunder.

Appellant filed his notice of appeal with the California Supreme Court on January 7, 1988. A copy of said notice is printed in Appendix "G."

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257(2). As in *Lathrop v. Donahue* 367 U.S. 820 (1961), Rule 2-101 and the Standard promulgated by the Board of Governors pursuant to such rule, represent state "statutes," legislative in character, the constitutionality of which appellant has challenged at each stage of the proceedings below. Since Appellant has been penalized for violating these "statutes," jurisdiction by appeal is proper.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law *** abridging the freedom of speech, or of the press *** "

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 2-101 of the Rules of Professional Conduct of the State Bar of California:

Professional employment

This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.

Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.

(A) A "communication" is a message concerning the availability for professional employment of a member or a member's firm. A "communication" made by or on behalf of a member shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format, which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of the circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly or by context, that it is a "communication"; or

(5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or

(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexations or harassing conduct.

(B) No solicitation or "communication" seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the potential client, nor shall a solicitation or "communication" specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or "communication" is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

Notwithstanding the foregoing, nothing in this subdivision (B) shall limit or negate the continuing professional duties of a member or a member's firm to former or present clients, or a member's right to respond to inquiries from potential clients.

(C) A member or member's firm shall not solicit or accept professional employment offered or obtained through the acts of an agent, runner or capper, which acts would be in violation of law, or which, if performed by a member of the State Bar, would be in violation of subdivisions (A) or (B) of this rule 2-101.

(D) The Board of Governors of the State Bar shall formulate and adopt standards as to what

"communications" will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar.

(E) The member shall retain for one year a true and correct copy or recording of any "communication" made by written or electronic media pertaining to the member of the member's firm. Upon written request, the member or the member's firm shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar the evidence of the facts upon which any factual or objective claims contained in the "communication" are based.

Standard adopted by the California State Bar Board of Governors pursuant to Rule 2-101:

"A 'communication' which contains testimonials about or endorsements of a member is presumed to violate Rule 2-101, Rules of Professional Conduct."

STATEMENT OF THE CASE

How The Federal Question Was Raised

During the proceedings in the lower tribunals and again in the Calfifornia Supreme Court, Appellant had properly drawn in question the validity of a state

"statute" on the ground of its being repugnant to the First Amendment of the United States Constitution. Although the lower tribunal held in Appellant's favor, the Review Department of the State Bar of California held in favor of the validity of the state "statute." The Supreme Court of the State of California denied Appellant's petition for writ of review.

Statement Of Facts

Appellant, Mark Oring, and his then partner, David Grey, engaged in a radio advertising program for professional employment which used the following statement of Sharon S.:

> "I was rear ended on the San Diego Freeway and all my medical bills were piling up and the insurance company was giving me a hard time, constantly harassed me, just all in all gave me a bad time. I contacated an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey and Oring. They immediately took the case and we finally ended up in court. I got a nice award of money and all of a sudden I got a phone call from Grey and Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to trial and suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I would definitely go back to Grey and Oring. I certainly do believe that."

This message was followed by an announcer adding:

> "Grey and Oring. That's G-r-e-y and Oring, a private law firm. If you have an automobile

accident, you need a lawyer. Grey and Oring, 558-8000. There's no charge for consultation. 558-8000."

Although there were no complaints against the advertising, an informal preliminary investigation was held before Referee Jerry Craig on November 10, 1981. Referee Craig made the following determination: (1) the advertisement was a testimonial; (2) Rule 2-101(D) was unconstitutional; (3) the testimonial was not actually misleading; and (4) as such, there were insufficient facts to warrant further proceedings.

The State Bar requested further proceedings from the Board of Governors' Committee on Adjudication and Discipline on the ground that an Investigation Department Referee was not authorized to determine the constitutionality of the Rules of Professional Conduct.

Inasmuch as the State Bar failed to take any action for 20 months, David Grey filed a Petition for Review of State Bar's Action with the Supreme Court of the State of California in or about November, 1983 (LA 31386). On March 28, 1984, that Court issued its order denying the Petition but ordered the State Bar to proceed or dismiss the case. In April, 1984, the State Bar filed a Notice to Show Cause.

On December 5, 1984, a set of Stipulations were entered into between Appellant and Appellee, including the following:

(1) A "Stipulation as to Facts and Disposition" wherein it was stated, at paragraph 4:

"4. The Statements of Sharon S. were extemporaneous and were true and reflected her

actual experience as a client of Grey and Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their office was present at the time the radio spot was recorded."

The disposition agreed to was a public reproval, subject to the second stipulation below. A copy of the "Stipulation as to Facts" is printed in Appendix "D."

(2) A "Stipulation Re: Filing and Force and Effect of 'Stipulation as to Facts and Disposition Etc.' " wherein it was agreed that the Stipulation as to Facts and Disposition would be of no force or effect unless and until a final disciplinary Order was made and entered against Appellant's partner, David Grey. Further, such Stipulation stated that Appellant would not be disciplined if his partner, Grey, was exonerated.

A copy of the "Stipulation Re: Filing and Force and Effect of 'Stipulation as to Facts and Disposition' " is printed in Appendix "E."

On December 5, 1984, a formal hearing was held before three referees, Lloyd Reed, James L. Kellner, and Barry J. Post. The State Bar presented no evidence. Upon consideration of the file, all papers filed on behalf of all parties, and oral argument, the panel unanimously agreed that Appellant was not culpable because Rule 2-101 was unconstitutional. (Appendix "B")

Pursuant to the State Bar's request for review, a hearing was held before the Review Department of the State Bar Court on August 28, 1985. By a vote of 5-4, with three referees abstaining, Standard (2) was held to be constitutional as applied to Appellant's partner,

David Grey, and it was resolved that David Grey be publicly reproved. (Appendix "F")

After the disciplinary order made by the Review Department upon David Grey became final, the 12 member Review Department reconvened In the Matter of Mark H. Oring, and on June 2, 1987, resolved as follows:

> "*RESOLVED* that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring, would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted."

Four referees voted "NO" on the adoption of such resolution, based upon their belief that the presumption and or Rule 2-101(D) was unconstitutional. (Appendix "A")

Appellant petitioned the California Supreme Court for a writ of review. On October 28, 1987, the California Supreme Court denied the petition, thereby upholding the disciplinary rules challenged by Appellant as violative of the First Amendment. (Appendix "C")

THE QUESTION IS SUBSTANTIAL

The question of whether a presumption that "testimonial" advertising is false, misleanding or deceptive, constitutes an invalid restraint upon protected commercial speech is substantial since courts have held that one seeking to uphold a restriction on commercial

speech should bear the burden of proving that such speech is unprotected. (e.g. *Bolger v. Youngs Drug Products Corp.* 463 U.S. 60, 71).

Moreover, the question is substantial because the rule prevents lawyers from presenting *truthful* "testimonial" advertising, and this, as applied, constitutes a "blanket ban" on such advertising. *Zauderer v. Office of Disciplinary Counsel* 471 U.S. 626 (1985). Why should a consumer be prevented from listening to a former client of Appellant stating *facts* which are unquestionably true and how can Appellant be disciplined for having his former client present such *facts*

Lawyers, of course, are entitled to First Amendment Protection as are other citizens, even when it comes to commercial speech "which serves individual and societal interests in assuring informed and reliable decisionmaking. *Bates v. State Bar of Arizona* 433 U.S. 350, 364 (1977). Because the California rule proscribes advertising which undeniably informs the public, whether the proscription is constitutional is a substantial question.

1. RULE 2-101 AND THE STANDARD ADOPTED PURSUANT TO SUCH RULE IMPERMISSIBLY SHIFT THE BURDEN OF PROOF TO THE ACCUSED ATTORNEY TO SHOW THAT HIS "TESTIMONIAL" ADVERTISING IS NOT FALSE, MISLEADING OR DECEPTIVE.

Rule 2-101(D) of the Rules of Professional Conduct of the State Bar of California and the Standard promulgated thereunder, provide that testimonial advertising is false, deceptive or misleading to the public (even if

this advertising is entirely truthful). Since this Court and other courts have held that the burden of proof must be on the person seeking to uphold a restriction on commercial speech, and since lawyer advertising is undoubtedly commercial speech, and since at least one other State has held that in the context of lawyer advertising, the one seeking to impose discipline must bear the burden of proof, the question as to the validity of the California Rule and Standard promulgated thereunder when challenged on First Amendment grounds is substantial.

This Court and other courts have held that the party seeking to uphold a restriction on commercial speech carries the burden of justifying the restriction. Thus, the California State Bar Rule and the Standard adopted thereunder cannot stand in the face of a constitutional challenge. *Bolger v. Youngs Drug Products Corp.* 463, U.S. 70, 71 fn. 20 (1983). See also, *Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York* 447 U.S. 557, 570 (1980); *Linmark Associates, Inc. v. Township of Willingboro* 431 U.S. 85, 93 (1977); *Primary Care Physicians Group P.C. v. Ledbetter* 634 F.Supp. 78, 82 (N.D. Ga 1986).

In the context of lawyer advertising, the Supreme Court of Wisconsin has interpreted this Court's holding in *In re R.M.J.* 455 U.S. 191 (1982), as requiring the burden of proof in a lawyer discipline case to be borne by the party seeking to impose that discipline. In *In the Matter of Disciplinary Proceedings Against Jack L. Marcus,* 107 Wis.2d 560, 320 N.W.2d 806 (1982), the Board of Attorneys Professional Responsibility appealed from an order of a referee dismissing complaints of professional misconduct filed against attorneys based on certain newspaper advertisements. The

Wisconsin Supreme Court affirmed the referee's order and stated:

> "In light of *R.M.J.*, we interpret [the disciplinary rule] and its predecessor as requiring the party which is seeking to have discipline imposed to bear the burden of proving by clear and satisfactory evidence that the advertisement violates the rule." (id.)

The conflict between the California rule which shifts the burden of proof to an accused attorney to show that his "testimonial" advertising is protected speech, and this and other court's decisions in, e.g., *Bolger,* supra, *R.M.J.,* supra, and *Matter of Marcus,* supra, make clear that the California rule cannot withstand constitutional scrutiny.

The reason why the burden of proof must, of necessity, be placed upon the party seeking to have speech curtailed was discussed in *Speiser v. Randall* 357 U.S. 513 (1958), wherein this Court was called upon to decide the validity of a California statute requiring a loyalty oath as a condition for obtaining a tax exemption which placed the burden upon the taxpayer to prove that he did not engage in criminal speech. In holding the "presumption" invalid under the speech and due process provisions of the Constitution, this Court said:

> "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding–inherent in all litigation–will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far

wider of the unlawful zone than if the State must bear these burdens. . . . How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. 'It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.' [citation omitted]." 357 U.S. at 562.

The California rule which is challenged here creates a presumption that "testimonials" are false, deceptive or misleading. As in *Speiser,* supra, the burden of proof is upon the individual to show that his speech is constitutionally protected, that is, not "misleading." But, as in *Speiser,* the State clearly has no substantial interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech.

Although the California rule which is challenged concerns commercial speech, the rationale of *Speiser* is still persuasive. As stated in *In re R.M.J.* 455 U.S. 191, 207:

> "But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements."

Similarly, imposing discipline upon the instant Appellant in the absence of a finding that his speech was misleading transgresses the requirements of the First and Fourteenth Amendments.

This court faced an issue nearly identical to the instant issue in *Zauderer v. Office of Disciplinary Counsel* 471 U.S. 626 (1985). There, as here, the Office of Disciplinary Counsel *stipulated that the advertisement's information and advice concerning the Dalkon Shield was neither false nor deceptive. In fact, it was completely accurate.* 105 S.Ct. at 2276. This Court held that a prophylactic restraint upon lawyer advertising was unconstitutional, stating:

> "Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. . . . Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to appellant's advertising." [emphasis added]. 105 S.Ct. at 2279-2280.

Similarly, the necessity for free flow of information regarding legal services is valuable enough to justify imposing on the would-be regulators the burden of proof.

2. AS APPLIED, RULE 2-101(D) AND THE STANDARD ADOPTED PURSUANT TO SUCH RULE CONSTITUTE A "BLANKET BAN" ON "TESTIMONIAL" ADVERTISING.

Appellant was disciplined although, (a) there was a specific finding at an informal hearing before Referee

Craig that the advertisement for which Appellant was disciplined was not in fact misleading; (b) the stipulation entered into between the Respondent and the State Bar states that the testimonial was true; and (c) there has never been a specific finding that the advertising was misleading. Thus, the net effect of the California Rule, and Standard promulgated thereunder, is that the legitimate, factual and truthful utterance is penalized. Since an attorney cannot possibly sustain the burden of proving the negative of these complex factual elements (i.e., not misleading) *Speiser,* supra, the application of the California Rule and the Standard promulgated thereunder result in a "blanket ban" on testimonial advertising.

In light of this Court's holdings in *Bates v. State Bar of Arizona* 433 U.S. 350 (1977), and *R.M.J.*, supra, a blanket ban on lawyer advertising is forbidden by the provisions of the First and Fourteenth Amendments of the United States Constitution. More specifically, in *Zauderer,* supra, this Court held that a disciplinary rule restricting illustrations in advertising was invalid, stating:

> "Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, the appellant may not be disciplined for his use of an accurate and nondeceptive illustration." 105 S.Ct. 2279-2280.

Similarly here, given the possibility of policing the use of testimonials on a case-by-case basis, the prophylactic approach (the presumption) taken by the State Bar of California cannot stand, and Appellant should not be disciplined for his use of an accurate testimonial.

At least one State Supreme Court has questioned the validity of a ban on "testimonial" advertising in light of this Court's holding in *Zauderer,* supra. See, e.g., *Jones v. Louisiana State Board of Dentistry* 483 So.2d 140 (La. Supreme Court 1986). Since the application of the California rule and standard promulgated thereunder result in a ban on testimonial advertising, the question of their validity is substantial.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

SCOTT SPOLIN
THEODORE A. COHEN
Counsel for Appellant
MARK ORING

APPENDIX "A"

STATE BAR COURT
THE STATE BAR OF CALIFORNIA
REVIEW DEPARTMENT
(Filed June 2, 1987)

PUBLIC MATTER

84-0-131 LA–In the Matter of Mark H. Oring

I, Lori King, hereby certify that I am Chief Deputy Clerk of the State Bar Court, and that as such, I am the custodian of records of all files of the State Bar Court, and that the following is a full, true and correct copy of a resolution or resolutions proposed at the meeting of the Review Department held in Los Angeles, California on April 2-3, 1987, and adopted as the decision of the Review Department on May 14, 1987 insofar as it relates to the above-entitled proceeding:

After discussion anad consideration by the Review Department of the record in the above-entitled proceeding and upon motioin made, seconded and adopted it was

RESOLVED that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted.

Referees Boyle, Hinderfeld, Katsky and Mitchell voted no on the adoption of the preceding motion and requested that the record so show. Referees Boyle, Katsky and Mitchell so voting on the ground that this body should have re-examined the issue(s) presented in *Grey v. State Bar,* Supreme Court No. LA 32152,

because in their view the presumption in Rule 2-101, Rules of Professional Conduct, is unconstitutioinal *Jacoby v. State Bar* (1977) 19 Cal.3d 359. The stipulation of Oring does not allow discipline when the first amendment of the U.S. Constitution precludes it.

Referee Hinerfeld stated as follows his reasons for voting no on the adoption of the foregoing resolution: If there is any validity to the Constitutional analyses in *Jacoby v. State Bar* (1977) 19 Cal.3d 359 and in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, the kind of information that the public is likely to want incident to selecting a lawyer is truthful testimonial evidence from satisfied clients and fee and cost data. See, e.g., the first two sentences in Justice Mosk's opinion for the Supreme Court in *Jacoby, supra* 19 Cal.3d at 362. See also *Jacoby,* supra, 19 Cal.3d at 368: ("The First Amendment protects the freedom of expression of all citizens, including lawyers. Petitioners have a right not only to respond to questions from the media on important issues, but also a right to seek out the media to express their views. Insofar as the present proceedings effectively inhibit petitioners from speaking their mind on an important issue–the delivery of inexpensive legal services to middle income persons–they infringe on important First Amendment rights.") (Headnotes and Footnotes omitted).

But consise fee information is generally misleading unless the law firm charges one price for every legal service which the public might request. The presumption against client testimonials will prevent the public from having the most reliable, concise indicator of the quality of a law firm's product.

If lawyers are effectively prohibited from giving concise, useful data on their fees and on the quality of their work, advertising will be reduced to mindless repetition of law firm names, addresses, and telephone numbers, which is what the lawyers were allowed to do in an alphabetical entry in the Yellow Pages before *Jacoby* and *Bates*. That information does not distinguish one law frim from another. It is basically useless.

The rebuttable presumption against testimonials in lawyer advertising is invalid under the first amendment and the free speech provision in the California Constitution. It is irrational and unreasonably frustrates the publics right to know and the attorney's right of free speech which are guaranteed by both constitutional provisions.

/s/ Lori King, Chief Deputy Clerk
of the State Bar Court

Dated: June 2, 1987

DECLARATION OF SERVICE

I, the undersigned, over the age of 18 years, whose business address and place of employment is 818 West Seventh Street, Los Angeles, California, declare that I am not a party to the within action; that in the City and County of Los Angeles, on the date shown below, I deposited a true copy of the within

MINUTES OF REVIEW DEPARTMENT MEETING
HELD ON APRIL 2 AND 3, 1987

in a sealed envelope as follows:

In a facility regularly maintained by the United States Postal Service with postage thereon fully prepaid addressed to:

Mark Howard Oring, Esq.
9401 Wilshire Boulevard
Suite 650
Beverly Hills, CA 90212

Theodore A. Cohen, Esq.
433 N. Camden Drive
Suite 900
Beverly Hills, CA 90210

In an inter-office mail facility regularly maintained by the State Bar of California addressed to:

Erica Tabachnick, Attorney At Law

Dated: July 7, 1987

I declare under penalty of perjury at Los Angeles, California, on the date shown above, that the foregoing is true and correct.

/s/ Deborah Harrison
Deputy Court Clerk
Effectuation Unit
Office of the State Bar Court

APPENDIX "B"

BREIDENBACH, SWAINSTON, YOKAITIS & CRISPO
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Los Angeles, California 90017-2787
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Attorney's for Respondent,
DAVID GREY

STATE BAR COURT
THE STATE BAR OF CALIFORNIA
DISTRICT 7

In the Matter of	84-0-131 LA (LA 3841)
DAVID A. GREY, MARK ORING	FINDINGS OF FACT AND RECOMMENDATION
Members of the State Bar	(Filed May 28, 1985)

DECISION

The above matter having been set for hearing, pursuant to the Rules of Procedure of the State Bar of California, including a statement of the matters to be subject of the hearing and written notice of the hearing having been given, the above-entitled matter came on regularly for hearing on December 5, 1984 at the office of the State Bar of California in Los Angeles.

Respondent, DAVID ASHBURN GREY, was represented by Steven J. Ruben, Esq. and Lori A. Toyama, Esq. of Breidenbach, Swainston, Yokaitis & Crispo. Theodore A. Cohen, Esq. reresented respondent MARK ORING. The examiners for the State Bar were Erica Tabachnik, Esq. and R. Gerald Markle, Esq.

The Hearing Panel consisted of Loyd Reed, Esq., James Kellner, Esq., and Barry J. Post, Esq. The Stipulation of Facts which was entered into by the State Bar and

respondents, was approved by the Hearing Panel and the parties were given an opportunity to present argument. The hearing was reported by Kathy Hall, C.S.R.

DECISION BY THE HEARING PANEL

This Hearing Panel unanimously finds no culpability on respondents, David A. Grey and Mark Oring, because Rule 2-101 is unconstitutional for the following two reasons: (1) the rule shifts the burden of proof that the attoney has been guilty of unprofessional conduct from the State Bar to the respondents requiring respondents to disprove culpability; and (2) there is no standard setting forth the requirements of what an attorney must meet in order to rebut the presumption of violation of Rule 2-101. This Hearing Panel need not and does not make a determination of whether the advertisement here involved is or is not misleading.

IT IS SO ORDERED.

DATED: May 17, 1985

/s/ LOYD W. REED

DATED: May 15, 1985

/s/ JAMES KELLNER

DATED: May 14, 1985

/s/ BARRY J. POST

APPENDIX "C"

S002271

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

MARK H. ORING

v.

THE STATE BAR OF CALIFORNIA

(Filed Oct. 28, 1987)

The petition for writ of review is DENIED

/s/ Lucas
Chief Justice

APPENDIX "D"

STATE BAR COURT
THE STATE BAR OF CALIFORNIA
DISTRICT 7

In the Matter of DAVID A. GREY, MARK ORING Members of the State Bar	84-0-131 LA (LA 3841) STIPULATION AS TO FACTS AND DISPOSITION Pursuant to Rule 407 of the Rules of Procedure of the State Bar

It is stipulated by and between the State Bar through its Examiners, R. GERALD MARKLE and ERICA TABACHNICK, and Respondent, MARK ORING, and his counsel, THEODORE A. COHEN, in accordance with Rule 407 of the Rules of Procedure of the State Bar as follows:

A. *THE FORMAL PROCEEDING INVOLVED*

This formal proceeding was commenced on or about April 24, 1984, by issuance of a Notice to Show Cause against David A. Grey and Mark Oring (hereinafter "Respondents"). On May 14, 1984, said Notice to Show Cause waas personally served on Respondents.

It is now the intention of the State Bar and Respondent, Mark Oring, to dispose of all charges in this proceeding pursuant to the terms of this stipulation, in accordance with Rule 407 of the Rules of Procedure of the State Bar.

B. *STATEMENT OF STIPULATED FACTS*

1. Respondent, David A. Grey, was admitted to the practice of law in the State of California on December 18, 1975. Respondent, Mark Oring, was admitted to the practice of law in the State of California on June 28, 1977.

2. In or about 1981, Respondents engaged in a radio advertising program concerning Respondents' availability for professional employment.

3. One such radio "spot" consisted of a former client of Respondents, Sharon S., giving the following message:

> "I was rear ended on the San Diego Freeway and my medical bills were piling up and the insurance company was giving me a hard time, constantly harrassed me, just all in all gave me a bad time. I contracted an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey & Ohring. They immediately took the case and we finally ended up in court. I got a nice award of money and all of a sudden I got a phone call from Grey & Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to trial and suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I'd definitely go back to Grey and Oring. I certainly do believe that."

Said message was followed by an announcer adding:

> "Grey & Oring. That's G-R-E-Y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey & Oring, 558-8000. There's no charge for consultation. 558-8000."

4. The statements of Sharon S. were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their office was present at the time the radio spot was recorded.

5. At the time they engaged in said radio advertising program, Respondents were aware of Rule 2-101 and,

in particular, of presumption (2), adopted pursuant to Rule 2-101(D) of the Rules of Professional Conduct, which states as follows:

> "(2) A 'communication' which contains testimonials about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct."

C. *STATEMENT OF MITIGATING CIRCUMSTANCES*

Respondent, Mark Oring, is 44 years old and was admitted to the State Bar of California on June 28, 1977. Prior to the instant proceeding, no formal disciplinary proceedings have been commenced against Respondent, Mark Oring. Respondent represents that he is not presently running any advertisements and has no intention of doing so in the future.

D. *RECOMMENDED STIPULATED DISPOSITION*

It is recommended that Respondent, Mark Oring, be admonished for running radio advertisements that included testimonials and/or endorsements concerning his availability for professional employment in violation of Rule 2-101 of the Rules of Conduct of the State Bar of California.

It is acknowledged and understood by the parties hereto that the within Stipulation As To Facts and Disposition is subject to review by the Review Department of State Bar Courts and the California Supreme Court. It is further acknowledged and understood by the parties that the within stipulation as to recommended disposition is not binding upon the California Supreme Court.

THE STATE BAR OF CALIFORNIA

DATED: 12/5/84
By: /s/ R. GERALD MARKLE
Examiner

DATED: 12/5/84
/s/ ERICA TABACHNICK
Examiner

DATED: 12/5/84
/s/ THEODORE A. COHEN, ESQ.
Attorney for Respondent Oring

DATED: 12/5/84
/s/ MARK ORING
Respondent

REVIEWED & APPROVED

DATED: 12/5/84
/s/ R. GERALD MARKLE
Assistant Chief Trial Counsel

APPENDIX "E"

THEODORE A. COHEN
Attorney at Law
433 N. Camden Drive #900
Beverly Hills, CA 90210
(213) 271-7164

Attorney for Respondent Mark Oring

STATE BAR COURT
THE STATE BAR OF CALIFORNIA
DISTRICT 7

In the Matter of:	No. 84-0-131 LA (LA 3841)
DAVID A. GREY, MARK ORING	STIPULATION RE: FILING AND FORCE OR EFFECT OF "STIPULATION AS TO FACTS AND DISPOSITION ETC."
Members of the State Bar	

It is hereby stipulated by and between the State Bar through its Examiners, GERALD R. MARKLE and ERICA TABACHNICK, and Respondent, MARK ORING, and his Counsel, THEODORE A. COHEN, as follows:

Reference is hereby made to that certain "Stipulation as to Facts and Disposition Pursuant to Rule 407 of the Rules of Procedure of the State Bar" an executed copy of which is attached hereto as Exhibit "A".

That the said Stipulation, (Exhibit "A") shall be of no force or effect unless and until a final disciplinary Order is made and entered as against Respondent DAVID A. GREY. Any Order so made as to DAVID A. GREY shall not be deemed "final" unless and until all appeals, petitions for hearing, petitions for certiorari, etc. have been exhausted at all State and Federal levels should GREY seek such relief.

In the event that GREY should be exonerated or the Notice to Show Cause herein dismissed, or in the event that GREY is otherwise discharged without the imposition of any discipline, the Stipulation (Exhibit "A") shall be of no force or effect, except that an admonition imposed upon or issued to GREY shall not invalidate such Stipulation (Exhibit "A"), it being the intention of the parties and counsel herein that ORING shall not be subject to any greater degree of discipline at any time as the degree of discipline ultimately imposed upon GREY.

THE STATE BAR OF CALIFORNIA

DATED: 12/5/84
By: /s/ R. GERALD MARKLE
Examiner

DATED: 12/5/84
/s/ ERICA TABACHNICK
Examiner

DATED: 12/5/84
/s/ THEODORE A. COHEN
Attorney for Respondent Oring

DATED: 12/5/84
/s/ MARK ORING
Respondent

REVIEWED & APPROVED

DATED: 12/5/84
/s/ R. GERALD MARKLE
Assistant Chief Trial Counsel

APPENDIX "F"

PUBLIC MATTER

STATE BAR COURT
THE STATE BAR OF CALIFORNIA

In the Matter of	)	
	)	84-0-131 LA
DAVID A. GREY & MARK H. ORING	)	
	)	(Filed Oct. 28, 1985)
A Member of the State Bar	)	

I, Judy Duffield, hereby certify that I am Clerk of the State Bar Court, and that as such, I am the custodian of records of all files of the State Bar Court, and that the following is a full, true and correct copy of the minutes of the meeting of the Review Department held in Los Angeles, California on August 28-29, 1985, insofar as they relate to the above-entitled proceeding.

The following persons appeared before the Review Department in the above-entitled matter: Steven J. Rubin and Lori A. Toyama, co-counsel for Respondent Grey, Erica Tobachnik and R. Gerald Markle, co-examiners for the State Bar. Mavis Theodoro, C.S.R., Court Reporter, was also present.

Referee Craig stated that he was disqualified from participating in this matter and did not paricipate in the considertion or decision of this proceeding.

There being no appearance by or on behalf of Respondent Mark H. Oring, Lori King, Chief Deputy Clerk, Office of the State Bar Court, stated that if there were no objection, the Office of the Clerk of the State Bar Court will make

part of the record copies of the notices of Review Department hearing sent to Respondent Mark H. Oring. No objections were stated thereto.

In response to a question from Referee Hinerfeld as to whether the parties had any objection to Referee Hinerfeld participating in this matter although Mr. Ruben had represented Mr. Hinerfeld's firm about ten years ago in an unrelated matter, the parties stated that each had no objection to Mr. Hinerfeld participating in this matter.

Ms. Tobachnik and Mr. Rubin each addressed the Review Department and each answered questions put to them by members of the Review Department.

Mr. Markle also answered questions put to him by members of the Review Department.

Respondent David A. Grey entered the room during the argument of counsel above.

The matter was taken under submission by the Review Department.

* * *

This matter previously having been submitted, after discussion and consideration of the matter by the Review Department and upon motion made, seconded and adopted, it was

RESOLVED that the Review Department hereby adopts findings of fact as to Respondent David A. Grey:

FINDINGS OF FACT

1. Respondent, David A. Grey, was admitted to the

practice of law in the State of California on December 18, 1975.

2. In or about 1981, Respondent engaged in a radio advertising program concerning Respondent's availability for professional employment.

3. One such radio "spot" consisted of a former client of Respondent, Sharon S., giving the following message:

> "I was rear ended on the San Diego Freeway and my medical bills were piling up and the insurance company was giving me a hard time, constantly harrassed me, just all in all gave me a bad time. I contracted [sic] an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey & Oring. They immediately took the case and we finally ended up in Court. I got a nice award of money and all of a sudden I got a phone call from Grey & Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to trial and suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I'd definitely go back to Grey and Oring. I certainly do believe that."

Said message was followed by an announcer adding:

> "Grey & Oring. That's G-R-E-Y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey & Oring, 558-8000. There's no charge for consultation. 558-8000."

4. The statements of Sharon S. were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring. Her statements were not discussed with either Mr. Grey or

Mr. Oring and neither they nor any lawyer from their office was present at the time the radio spot was recorded.

5. The above statements of Sharon S. constituted an endorsement of Respondent.

6. At the time the Resondent engaged in said radio advertising program, Respondent was aware the provisions of Rule 2-101, Rules of Professional Conduct, and, in particular was aware of standard (2), adopted by the Board of Governors of the State Bar pursuant to Rule 2-101(D) of the Rules of Professional Conduct. Standard (2) states as follows:

> "(2) A 'communication' which contains testimonials about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct."

7. The above quoted presumption adopted pursunt to Rule 2-101(D), Rules of Procedure of the State Bar, is constitutional as applied to Respondent David A. Grey. Respondent failed to present evidence sufficient to rebut said presumption".

FURTHER *RESOLVED* that the Respondent, David A. Grey is hereby publicly reproved.

Voting Yes:	Referees Dell'Ario, Lynch, Parkin, Vogt and Anderson.
Voting No:	Referees Ching, Hinerfeld, Mackey, Reading.
Not Voting:	Referees Craig, Kilpatrick, Orr.

Referee Hinerfeld stated as follows his reasons for voting no on the adoption of the foregoing resolution: If there is any validity to the Constitutional analyses in *Jacoby v. State Bar* (1977) 19 Cal.3d 359 and in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, the kind of information that the

public is likely to want incident to selecting a lawyer is truthful testimonial evidence from satisfied clients and fee and cost data. See, e.g., the first two sentences in Jusice Mosk's opinion for the Supreme Court in *Jacoby. supra,* 19 Cal.3d at 362. See also *Jacoby, supra,* 19 Cal.3d at 368: ("Petitioners have a right not only to respond to questions from the media on important issues, but also a right to seek out the media to express their views. Insofar as the present proceedings effectively inhibit petitioners from speaking their mind on an important issue–the delivery of inexpensive legal services to middle income persons–they infringe on important First Amendment rights").

But concise fee information is generally misleading unless the law firm charges one price for every legal service which the public might request. The presumption against client testimonials will prevent the public from having the most reliable, concise indicator of the quality of a law firm's product.

> If lawyers are effectively prohibited from giving concise, useful data on their fees and on the quality of their work, advertising will be reduced to mindless repetition of law firm names, addresses, and telephone numbers, which is what the lawyers were allowed to do in an alphabetical entry in the Yellow Pages before *Jacoby* and *Bates.* That information does not distinguish one law firm from another. It is basically useless.

The rebuttable presumption against testimonials in lawyer advertising is invalid under the first amendment and the free speech provision in the California Constitution. It is irrational and unreasonably frustrates the public's right to know which is guaranteed by both constitutional provisions.

> *Referee Ching* stated the following reasons for voting no on the adoption of the foregoing resolution: 1) The record contains insufficient evidence

> to sustain the findings of culpability; and 2) Presumption #2 is in conflict with other sections of Rule 2-101 Rules of Professional Conduct and therefore exceeds authority granted in Rule 2-101(D). As such, it amounts to conclusive presumption.

Dated: October 23, 1985

/s/ Judy Duffield, Clerk
of the State Bar Court

DECLARATION OF SERVICE

I, the undersigned, over the age of 18 years, whose business address and place of employment is 1230 West Third Street, Los Angeles, California, declare that I am not a party to the within action; that in the City and County of Los Angeles, on the date shown below, I deposited a true copy of the within

MINUTES OF REVIEW DEPARTMENT MEETING HELD ON AUGUST 28 AND 29, 1985 in a sealed envelope as follows:

In a facility regularly maintained by the United States Postal Service with postage thereon fully prepaid addressed to:

David Ashburn Grey, Esq.
1800 North Vine
2nd Floor
Los Angeles, CA 90028

Steven J. Ruben, Esq.
Lori A. Toyama, Attorney at Law
611 West Sixth Street
Suite 1300
P.O. Box 57936
Los Angeles, CA 90017

In an inter-office mail facility regularly maintained by the State Bar of California addressed to:

Erica Tabachnick, Attorney of Law
R. Gerald Markle, Esq.

Dated: December 17, 1985

I declare under penalty of perjury at Los Angeles, California, on the date shown above, that the foregoing is true and correct.

/s/ Deborah Harrison
Office of the State Bar Court

APPENDIX "G"

SCOTT SPOLIN
THEODORE A. COHEN
Attorneys at Law
433 North Camden Drive
Suite 900
Beverly Hills, CA 90210

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARK H. ORING, Appellant, vs. THE STATE BAR OF CALIFORNIA, Appellee.	Case No: Cal. Supreme Ct. S002271 NOTICE OF APPEAL (Filed Jan. 7, 1988)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

NOTICE IS HERBY GIVEN that Mark H. Oring, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, denying review and thereby imposing discipline upon the Appellant as recommended by the Review Department of the State Bar Court, State Bar of California, entered herein on October 28, 1987.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

DATED: January 6, 1987

/s/ SCOTT J. SPOLIN
Counsel of Record for Appellant

I, the undersigned, say: I am a party, or an authorized representative of a party, to the within action; I have read the foregoing pleadings and/or documents to which this verification is attached and know the contents thereof; and that the same is true of my own knowledge, except as the matters which are therein stated upon my information or belief, and to those matters that I believe it to be true.

I certify the foregoing to be true under penalty of perjury.

Executed in California at the City of (place)
on (date)

(signature)

*PROOF OF SERVICE BY MAIL . . .*CCP 1013a, 2015.5

I, the undersigned, say: I am employed at the business address of 433 N. Camden Drive, Beverly Hills, California; I am over the age of 18 years and am not a party to the within action; on the date stated below I served the pleadings and/or documents affixed hereto by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail adjacent to my above stated business address, addressed as follows:

STATE BAR OF CALIFORNIA
555 Franklin Street
San Francisco, CA 94102

(Three Copies)

I certify the foregoing to be true under penalty of perjury. Executed at Beverly Hills, California on January 6, 1987.

/s/ MARTIN LOUIS STANLEY